

A Lai Cheng Ooi v Lim San Peen & Anor and other appeals

B FEDERAL COURT (PUTRAJAYA) — APPLICATION NOS 08(i)-297–06
OF 2017, 08(i)-300–06 OF 2017 AND 08(i)-301–06 OF 2017
RAUS SHARIF CHIEF JUSTICE, BALIA YUSOF AND JEFFREY TAN
FCJJ
28 MAY 2018

C *Civil Procedure — Action — Action against company in liquidation — High
Court ordered that no action could be maintained against company in liquidation
or its receivers without leave of court — Whether applicant could commence action
against company in liquidation — Whether leave of court obtained — Whether
leave of Director General of Insolvency obtained — Whether applicant had locus
standi*

E The applicant was the widow and executor of one Lee Tain Eshung ('the
deceased') who held 60% of the equity of Tamparuli Granite Quarry (Sabah)
Sdn Bhd ('Tamparuli'). In 1983, Tamparuli entered into a sale and purchase
agreement ('SPA') with Naslei Enterpreise Sdn Bhd ('Naslei') to purchase a
property at the purchase price of RM970,000. According to the applicant, a
further sum of RM208,886 was set off by Naslei against materials supplied by
Tamparuli. In 1989, receivers were appointed to manage Naslei and the High
F Court ordered that no action could be maintained against Naslei or its receivers
without leave of court. The deceased was adjudged a bankrupt in 2001 until his
death in 2008. Tamparuli was wound up in 2011. In 2014, the applicant
obtained probate to the estate of the deceased. At the High Court, the applicant
submitted that the applicant's intention to complete the purchase of the
G property should have been considered by the creditors. The applicant
submitted that: (a) the receiver failed to complete the purchase of the property
as it was alleged that there were insufficient funds; (b) she was ready, willing and
able to pay the balance purchase price; (c) even though she was given notice, she
was not allowed to attend the meeting of the creditors of Tamparuli; and (d) the
H asset of Tamparuli was given up to its detriment. The applicant sought: (i) a
declaration that the termination of the SPA and forfeiture of monies paid were
null and void; (ii) a declaration that the SPA was valid and subsisting; and (iii) a
direction that Naslei do not complete the sale of the property upon payment by
the applicant through the receiver, of the balance purchase price. The High
I Court held that Naslei should be struck out as a defendant as the applicant
lacked locus standi to challenge the decision of the Director General of
Insolvency ('the DGI') to commence the action against Naslei. The applicant
appealed to the Court of Appeal and the Court of appeal ruled in favour of the
respondent. Hence, the present application for leave to appeal.

Held, dismissing the application:

- (1) When the ex parte leave was set aside, the action could no longer be proceeded with against Naslei and receiver and Tamparuli and receiver. The action could be struck out on that ground alone without the necessity to consider the locus standi of the applicant. Section 226(3) of the Companies Act 1965 provided that 'when a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced except with the leave of court'. That equally applied to an action or proceeding against the receiver of a company under liquidation (see para 15).
- (2) When the ex parte leave was set aside, it produced the result that there was no leave of court to proceed with the action, such that the applicant could only proceed with the action, if leave were applied afresh and granted, or if the order setting aside the ex parte leave were set aside. The applicant opted to attack the order setting aside the ex parte leave. The principle that a judge has no power or jurisdiction to set aside an order of another judge of concurrent jurisdiction did not apply to ex parte orders (see para 16).

[Bahasa Malaysia summary]

Pemohon adalah balu dan pentadbir seorang bernama Lee Tain Eshung ('si mati') yang memegang 60% ekuiti dalam Tamparuli Granite Quarry (Sabah) Sdn Bhd ('Tamparuli '). Pada tahun 1983, Tamparuli menandatangani perjanjian jual beli ('PJB') dengan Naslei Enterprise Sdn Bhd ('Naslei') untuk membeli hartanah dengan harga pembelian sebanyak RM970,000. Menurut pemohon, sejumlah RM208,886 lagi telah ditolak-selesai oleh Naslei dengan bahan-bahan yang dibekalkan oleh Tamparuli. Pada tahun 1989, penerima telah dilantik untuk menguruskan Naslei dan Mahkamah Tinggi memerintahkan supaya tidak ada tindakan dimulakan terhadap Naslei atau penerimanya tanpa kebenaran mahkamah. Si mati telah dihukum bankrap pada tahun 2001 sehingga kematiannya pada tahun 2008. Tamparuli digulung pada tahun 2011. Pada tahun 2014, pemohon memperoleh probet atas harta pusaka si mati. Di Mahkamah Tinggi, pemohon menghujahkan bahawa niat pemohon untuk menyelesaikan pembelian harta tersebut harus dipertimbangkan oleh pemiutang. Pemohon mengemukakan bahawa: (a) penerima gagal menyempurnakan pembelian harta itu atas dakwaan tidak terdapat dana yang mencukupi; (b) dia bersedia, sanggup dan mampu membayar harga pembelian; (c) walaupun dia diberi notis, dia tidak dibenarkan menghadiri mesyuarat pemiutang Tamparuli; dan (d) aset Tamparuli yang diberi telah merugikannya. Pemohon memohon: (i) perisytiharan bahawa penamatan PJB dan pelucuthakan wang yang dibayar adalah terbatal dan tidak sah; (ii) perisytiharan bahawa PJB adalah sah dan berkuat kuasa; dan (iii) arahan bahawa Naslei tidak menyempurnakan penjualan harta itu selepas pembayaran penuh harga pembelian oleh pemohon

- A melalui penerima. Mahkamah Tinggi berpendapat bahawa Naslei sepatutnya
dibatalkan sebagai defendan kerana pemohon tidak mempunyai locus standi
untuk mencabar keputusan Ketua Pengarah Insolvency untuk memulakan
tindakan terhadap Naslei. Pemohon merayu kepada Mahkamah Rayuan dan
B Mahkamah Rayuan memutuskan untuk memihak kepada responden. Oleh
itu, permohonan ini untuk kebenaran merayu.

Diputuskan, menolak permohonan:

- C (1) Apabila kebenaran ex parte diketepikan, tindakan tersebut tidak lagi
boleh diteruskan terhadap Naslei dan penerima. Tindakan tersebut
boleh dibatalkan atas alasan itu sahaja tanpa perlu mempertimbangkan
lokus standi pemohon. Seksyen 226(3) Akta Syarikat 1965
memperuntukkan bahawa 'apabila perintah penggulungan telah dibuat
atau pelikuidasi sementara telah dilantik, tiada tindakan atau prosiding
D hendaklah diteruskan atau dimulakan kecuali dengan kebenaran
mahkamah'. Ini juga terpakai dalam tindakan atau prosiding terhadap
penerima sebuah syarikat dalam likuidasi (lihat perenggan 15).
- E (2) Apabila kebenaran ex parte parti diketepikan, ia menghasilkan keputusan
bahawa tidak ada kebenaran mahkamah untuk meneruskan tindakan itu,
hinggakan pemohon hanya dapat meneruskan tindakan tersebut jika
kebenaran baharu dipohon dan diberi, atau jika perintah pengetepian ex
parte diketepikan. Pemohon memilih untuk 'menyerang' perintah
mengetepikan kebenaran ex parte. Prinsip bahawa hakim tidak
F mempunyai kuasa atau bidang kuasa mengetepikan perintah hakim lain
yang mempunyai bidang kuasa serentak tidak berlaku untuk perintah ex
parte (lihat perenggan 16).]

Notes

- G For cases on action in general, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue)
paras 50–276.

Cases referred to

- H *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1
MLJ 393; [1998] 2 CLJ 75, FC (refd)
Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)
Malaysian International Trading Corp Sdn Bhd v RHB Bank Bhd [2016] 2 MLJ
457, FC (refd)
- I *Selvam Holdings (M) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd; (BSN
Commercial Bank (M) Bhd & Ors, Interveners)* [2000] 3 MLJ 201, CA (refd)
Tai Kwong Goldsmiths & Jewellers (under receivership) v Yap Kooi Hee & Ors
[1995] 1 MLJ 1, CA (refd)

Legislation referred to

Companies Act 1965 (repealed by the Companies Act 2016) ss 216, 226(3), 279

Companies Act 2016

Bankruptcy Act 1967 (now Insolvency Act 1967)

Rules of the High Court 1980 O 32 r 6, O 92

Rules of Court 2012 O 18 r 19, O 32 r 6

Tai Choi Yu (CL Lim & Co) in Application Nos 08(i)-297-06 of 2017, 08(i)-300-06 of 2017 and 08(i)-301-06 of 2017 for the appellant.

S Vanugopal (S Vanugopal & Partners) in Application Nos 08(i)-297-06 of 2017 and 08(i)-301-06 of 2017 for the first respondent.

S Vanugopal (S Vanugopal & Partners) in Application No 08(i)-300-06 of 2017 for the first and second respondents.

Monica Lin Sua (Malaysian Department of Insolvency) in Application No 08(i)-300-06 of 2017 for the third and fourth respondents.

Wong Heu Fun (Leong & Wong) in Application No 08(i)-300-06 of 2017 for the fifth respondent.

Jeffrey Tan FCJ (delivering judgment of the court):

[1] On 13 April 2018, we heard and unanimously dismissed the application for leave to appeal on the following ‘questions of law’:

- (a) whether the time-honoured and established principle of law that a High Court judge has no power or jurisdiction to set aside an order of another High Court judge regularly granted in the exercise of concurrent jurisdiction as enunciated in the classic Federal Court case of *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 be overruled? and
- (b) whether the High Court has the power and jurisdiction to strike out the Writ of Summons in Suit No BKI-22NCvC-91/8 of 2015 under O 18 r 19 which was filed and submitted in the name of the Yang Di-Pertua the Agong of Malaysia?

[2] The background facts could be summarised as follows. The applicant of this leave application, Lai Cheng Ooi, is the widow and executor of Lee Tain Eshung (‘the deceased’) who held 60% of the equity of Tamparuli Granite Quarry (Sabah) Sdn Bhd (‘Tamparuli’). On 10 May 1983, Tamparuli entered into a sale and purchase agreement (‘agreement’) with Naslei Enterprise Sdn Bhd (‘Naslei’) to purchase property described as ‘1202 Waikiki Condominiums’ (‘the property’). Tamparuli paid RM304,000 towards the purchase price of RM970,000. The applicant contended that Naslei admitted that a further sum of RM208,886 was set off against materials supplied by Tamparuli.

A [3] On 19 January 1989, receivers were appointed to manage Naslei. On 19 July 1991, the High Court ordered that no action could be maintained against Naslei or its receivers without the leave of court. On 23 November 2001, the deceased was adjudged a bankrupt and remained a bankrupt on the date of his death on 14 June 2008. On 6 February 2014, the applicant obtained probate to the estate of the deceased. On 18 October 2011, Tamparuli was wound up on the petition of the Government of Malaysia.

C [4] The applicant complained that the receiver failed to complete the purchase of the property. The applicant averred that she was ready, willing, and able to pay the balance purchase price. The applicant contended that though she was given notice, she was not allowed to attend the meeting of the creditors of Tamparuli, that the Inland Revenue Department told her that her right to secure the property had been forfeited, that by letter dated 25 March 2014 she was informed that because of insufficient funds the receiver had no intention to complete the purchase of the property, and that Naslei forfeited the initial payments. The applicant further contended that that asset of Tamparuli was given up to the detriment of Tamparuli. At the trial court, learned counsel for the applicant argued that the intention of the applicant to complete the purchase of the property should have been considered by the creditors; apparently, the applicant was allowed to complete the purchase of another property by the deceased in his own name.

F [5] At the trial court, the applicant sought: (a) a declaration that the termination of the agreement and forfeiture of monies paid were null and void; (b) a declaration that the agreement was valid and subsisting; (c) and a direction that Naslei do complete the sale of the property, upon payment by the applicant through the receiver, of the balance purchase price.

G [6] Naslei and the receiver of Tamparuli raised two objections to the action.

H [7] The first objection of Tamparuli was that pursuant to s 216 of the Companies Act 1965 read together with the provisions of the Bankruptcy Act 1967, the applicant had no standing to complain about the manner in which the affairs of Tamparuli was administered by the receiver in his capacity as the liquidator. The trial court held that by reason of s 216 of the Companies Act 1965, the Director General of Insolvency ('the DGI') became the contributory of Tamparuli, and that the grant of probate did not entitle the applicant to claim that she was a contributory of Tamparuli or the legal representative of the deceased with respect to the shareholding of the deceased in Tamparuli. The second objection of Tamparuli was that pursuant to s 226(3) of the Companies Act 1965, no action or proceeding could be proceeded with or commenced against Tamparuli without the leave of court. The trial court held that s 226(3) of the Companies Act 1965 did not apply, as the action was against the receiver

and not against the company. However, the trial court held that under s 279 of the Companies Act 1965, the applicant had no locus standi to challenge the decision of the DGI.

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[8] The objection of Naslei was that the leave of court was not obtained to commence the action against Naslei, in accord with the order of court dated 9 July 1991. The trial court upheld that objection and held that Naslei should be struck out as a defendant.

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[9] Essentially, the trial court held that the applicant lacked the locus standi to challenge the decision of the DGI, and that the applicant had no leave of court to commence the action against Naslei. The applicant appealed to the Court of Appeal.

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[10] Pertinent to the leave of court to commence action against Tamparuli and or Naslei, the Court of Appeal imparted the following facts. On 19 June 2015 and 18 August 2015, the applicant, pursuant to her ex parte applications, obtained leave to commence action against Tamparuli, Naslei, and the receivers of those companies. With leave, albeit obtained ex parte, the applicant commenced action for specific performance (BKI-22NCvC-91/8 of 2015) against Naslei and receiver, Tamparuli and receiver, and Danaharta Urus Sdn Bhd. All defendants applied under O 18 r 19 of the Rules of Court 2012 to strike out the action. Naslei and receiver applied to set aside the ex parte leave. Meantime, the striking out application was stayed pending disposal of the application to set aside the ex parte leave. On 23 March 2016, the High Court (a different judge) set aside the ex parte leave. On 25 August 2016, the action was struck out.

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[11] In paras 8–9 of its judgment, the Court of Appeal noted that: (a) the order dated 9 July 1991 stated that ‘no action, application shall be commenced, continued or maintained against (Naslei) and or the court appointed receivers and managers thereof without first leave of this court being obtained’; (b) the judge who set aside the ex parte leave recorded in the notes of proceedings that the order of 9 July 1991 was not brought to the attention of the judge who granted the ex parte leave; and (c) the judge who set aside the ex parte leave recorded in the notes of proceedings that Naslei should have been served with notice of the application for leave.

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[12] In paras 10–11 of its judgment, the Court of Appeal related that the applicant argued that: (a) the High Court was functus officio, as the order granting ex parte leave had been sealed and perfected; (b) the High Court had no power or jurisdiction to set aside the order of another High Court judge of concurrent jurisdiction; and (c) the defendants should have appealed against

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A the ex parte leave or instituted separate proceedings to impeach the ex parte leave.

[13] To those arguments, the Court of Appeal held that: (a) any ex parte order is liable to be set aside; (b) the High Court was not functus officio; (c) it is not mandatory to appeal or file separate proceedings to impeach an ex parte order (the Court of Appeal referred to *Selvam Holdings (M) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd*; (*BSN Commercial Bank (M) Bhd & Ors, Interveners*) [2000] 3 MLJ 201); (d) an order obtained in breach of the rules of natural justice can be set aside in the same proceedings; (e) the applicant was in breach of the order dated 9 July 1991; (f) no action can be brought against a receiver without the leave of court (the Court of Appeal referred to *Tai Kwong Goldsmiths & Jewellers (under receivership) v Yap Kooi Hee & Ors* [1995] 1 MLJ 1); and (g) the setting aside of an ex parte order is an exception to the general rule that an order perfected and sealed cannot be set aside in the same action; errors can be corrected to reflect the intention of the court; (h) it did not matter that the ex parte leave was set aside by a different judge, as either judge had the jurisdiction to set aside an ex parte order; (i) since ex parte leave was granted in the absence of parties who ought to have been heard, it became one of the exceptions to the general rule as to functus officio; (j) *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75, which was cited by the applicant, was of no assistance to the applicant; and (k) whatever assets of Tamparuli belonged to Tamparuli and not to shareholders; the applicant had no cause of action to enforce the agreement entered by Tamparuli.

[14] Evidently, there was leave of court, albeit made ex parte, to commence the action against Naslei and receiver, and Tamparuli and receiver. But when the ex parte leave was set aside, that was no longer the requisite leave of court to proceed with the action against Naslei and receiver, and Tamparuli and receiver. The action was commenced with the leave of court. But when the ex parte leave was set aside, the action could no longer be proceeded with against Naslei and receiver, and Tamparuli and receiver. Both courts below ruled in favour of the respondents on the ground that the applicant lacked the locus standi to challenge the decision of the DGI, and that there was no leave of court to commence the action against Naslei and receiver, and Tamparuli and receiver.

[15] We were however of the view that when the ex parte leave was set aside, the action could no longer be proceeded with against Naslei and receiver and Tamparuli and receiver. The action could be struck out on that ground alone without the necessity to consider the locus standi of the applicant. Section 226(3) of the Companies Act 1965 (repealed by Companies Act 2016) provided that 'when a winding up order has been made or a provisional

liquidator has been appointed no action or proceeding shall be proceeded with or commenced except with the leave of court'. That equally applied to an action or proceeding against the receiver of a company under liquidation. In *Tai Kwong Goldsmiths*, the former Supreme Court per VC George J, as he then was, delivering the judgment of the court, held that 'no action could be brought against a receiver, in his capacity as such, ... without the leave of the court and if such an action or proceeding is brought without leave, its further prosecution will be restrained'.

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[16] When the ex parte leave was set aside, it produced the result that there was no leave of court to proceed with the action, such that the applicant could only proceed with the action, if leave were applied afresh and granted, or if the order setting aside the ex parte leave were set aside. The applicant opted to attack the order setting aside the ex parte leave. Leave question 1 proposed that it was 'the time-honoured and established principle of law that a High Court judge has no power or jurisdiction to set aside an order of another High Court judge regularly granted in the exercise of concurrent jurisdiction as enunciated in the classic Federal Court case of *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 be overruled'. But with respect, the principle that a judge has no power or jurisdiction to set aside an order of another judge of concurrent jurisdiction does not apply to ex parte orders. Any 'order made ex parte may be set aside (see O 32 r 6 of the Rules of Court 2012) by the same judge or court which granted the ex parte order, or by a different judge of the same court which granted the ex parte order. For that clear position in law, we need only to refer to the recent decision of *Malaysian International Trading Corp Sdn Bhd v RHB Bank Bhd* [2016] 2 MLJ 457, where it was held by the Federal Court per Suriyadi FCJ, delivering the judgment of the majority, that 'jurisdictionally, a court under O 32 r 6 of the RHC or under O 92 of the RHC, may set aside any ex parte order'. Under O 32 r 6 of the Rules of Court 2012, any judge of the same court has jurisdiction to set aside any ex parte order. 'This is necessary in the interest of justice as the party who was not heard may wish to object to the order' (*Singapore Court Practice* 2017 by Jeffrey Pinsler Vol 1 at para 32/3/4).

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[17] An order made ex parte may be regular, in that it was made within jurisdiction. But that does not mean that an ex parte order could not be set aside, be it by the same or different judge of the court which granted the ex parte order. The proposed leave questions, even if allowed to be argued in full, could not possibly succeed. It was for the aforesaid reasons, that we dismissed the leave application with costs.

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A *Application dismissed with costs.*

Reported by Afiq Mohamad Noor

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